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6 7	Attorneys for BANK OF AMERICA, NATIONAL ASSOCIATION AS SUCCESSOR BY MERGER TO LASALLE BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR CERTIFICATEHOLDERS OF BEAR STEARNS ASSET BACKED SECURITIES TRUST 2005-3, ASSET-BACKED CERTIFICATES, SERIES 2005-3		
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9	UNITED STATES BANKRUPTCY COURT		
10	NORTHERN DISTRICT OF CALIFORNIA - OAKLAND DIVISION		
11	In re	Case No.09-71561-LJT	
12	NICOLE CHRISTINA MCCONVILLE,	Chapter 7	
13	Debtor(s).	R.S. No. CJR-641	
14 15		MOTION FOR RELIEF FROM AUTOMATIC STAY	
		(11 U.S.C. § 362 and Bankruptcy Rule 4001)	
16 17		DATE: March 19, 2010 TIME: 11:00am	
18		CTRM: 201	
19		1300 Clay Street, Suite 300	
20		Oakland, CA 94604-1426	
21			
22			
23	Bank of America, National Association as successor by merger to LaSalle Bank National		
24	Association, as Trustee for Certificateholders of Bear Stearns Asset Backed Securities Trust		
25	2005-3, Asset-Backed Certificates, Series 2005-3 ("Movant"), moves this court for an order		
26	terminating the automatic stay of 11 U.S.C. § 362 as to Movant, so that Movant may commence		
27	and continue all acts necessary to enforce its security interest in real property generally		
28	described as 57 N. Broadway # A, B, C & D Baypoint, California 94565.		

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1	On or about December 2, 2009, Nicole Christina McConville ("Debtor") filed a	
2	voluntary petition under Chapter 7 of the Bankruptcy Code, and Tevis Thompson was appointed	
3	as Chapter 7 Trustee. As a result of said filing, certain acts and proceedings against Debtor and	
4	the bankruptcy estate are stayed as provided in 11 U.S.C. § 362.	
5	Movant moves this court for relief from stay under 11 U.S.C. §§ 362(d)(1) and	
6	362(d)(2).	
7	MEMORANDUM OF POINTS AND AUTHORITIES	
8	<u>I.</u>	
9	MOVANT IS ENTITLED TO RELIEF FROM THE	
10	AUTOMATIC STAY UNDER 11 U.S.C. § 362(d)(2).  NO EQUITY	
11		
12	11 U.S.C. § 362(d)(2) provides that relief from the automatic stay shall be granted if the	
13	debtor does not have any equity in the property and the property is not necessary to the debtor's	
14	effective reorganization.	
15	In <u>In re San Clemente Estates</u> , 5 B.R. 605 (Bankr. S.D. Cal. 1980), the court stated that: § 362(d)(2) reflects congressional intent to allow creditors to	
16	immediately proceed against the property where the debtor has no	
17	equity and it is unnecessary to the reorganization, even where the debtor can provide adequate protection under § 362(d)(1).	
(Emphasis added).	(Emphasis added).  Id. at 610 (emphasis added).	
19		
20	In <u>In re Mikole Developers, Inc.</u> , 14 B.R. 524, 525 (Bankr. E.D. Pa. 1981), the court	
21	stated that in determining whether equity exists in the property for purposes of § 362(d)(2), all	
22	encumbrances are totalled, whether or not all the lienholders have joined in the request for relief	
23	from stay. The Ninth Circuit has concurred with this view in Stewart v. Gurley, 745 F.2d 1194	
24	(9th Cir. 1984).	
25	An appropriate cost of sale factor should also be added to determine if the debtor has	
26	any equity in the property. <u>La Jolla Mortgage Fund v. Rancho El Cajon Associates</u> , 18 B.R.	
27	283, 289 (Bankr. S.D. Cal. 1982).	

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On or about May 18, 2005, Debtor, for valuable consideration, made, executed and delivered to Silver State Financial Services, DBA Silver State Mortgage ("Lender") a Note in the principal sum of \$517,500.00 (the "Note"). Pursuant to the Note, Debtor is obligated to make monthly principal and interest payments commencing July 1, 2005, and continuing until June 1, 2035, when all outstanding amounts are due and payable. The Note provides that, in the event of default, the holder of the Note has the option of declaring all unpaid sums immediately due and payable. A true and correct copy of the Note is attached to the Declaration in Support of Motion for Relief From Automatic Stay as exhibit A and incorporated herein by reference.

On or about May 18, 2005, the Debtor made, executed and delivered to Lender a Deed of Trust (the "Deed of Trust") granting Lender a security interest in real property commonly described as 57 N. Broadway # A, B, C & D Baypoint, California 94565 (the "Real Property"), which is more fully described in the Deed of Trust. The Deed of Trust provides that attorneys' fees and costs incurred as a result of the Debtor's bankruptcy case may be included in the outstanding balance under the Note. The Deed of Trust was recorded on May 25, 2005, in the Official Records of Contra Costa County, State of California. A true and correct copy of the Deed of Trust is attached to the Declaration in Support of Motion for Relief From Automatic Stay as exhibit B and incorporated herein by reference.

Subsequently, all beneficial interest in the Deed of Trust was sold, assigned and transferred to Movant. A true and correct copy of the Corporation Assignment of Deed of Trust evidencing the Assignment of the Deed of Trust to Movant is attached to the Declaration in Support of Motion for Relief From Automatic Stay as exhibit C and incorporated herein by reference.

The obligation under the Note is in default as of September 1, 2008, for failure to make payments to Movant. As of February 4, 2010, the total obligation due and owing under the Note is in the approximate amount of \$564,792.90, representing the principal balance of \$505,309.40, interest in the sum of \$52,788.95, late charges in the amount of \$2,167.88, and escrow advances in the amount of \$4,526.67. This is an approximate amount for purposes of this Motion only, and should not be relied upon as such to pay off the subject loan as interest and

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## III.

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## **MOVANT IS ENTITLED TO RELIEF FROM THE** AUTOMATIC STAY UNDER 11 U.S.C. § 362(d)(1).

# CAUSE - LACK OF ADEQUATE PROTECTION

Pursuant to the provisions of 11 U.S.C. §§ 361 and 362(d)(1), Movant is entitled to adequate protection of its interest in the Property.

Movant submits that adequate protection in this case requires normal and periodic cash payments, as called for by the Note, plus the repayment of any and all delinquent amounts owed to Movant, including all attorneys' fees and costs incurred in the filing of this motion.

Movant is informed and believes that Debtor is presently unwilling or unable to provide adequate protection to the Movant and there is no probability that adequate protection can be afforded to Movant within a reasonable time.

By reason of the foregoing, Movant is entitled to relief from stay under 11 U.S.C. § 362(d)(1), based upon the failure of Debtor to provide adequate protection to Movant.

WHEREFORE, Movant respectfully prays for an Order of this court as follows:

- 1. Terminating the automatic stay of 11 U.S.C. § 362, as it applies to the enforcement by Movant of all of its rights in the Real Property under the Note and the Deed of Trust:
  - 2. That the 14-day stay described by Bankruptcy Rule 4001(a)(3) be waived;
- 3. Granting Movant leave to foreclose on the Real Property and to enforce the security interest under the Note and the Deed of Trust, including any action necessary to obtain possession of the Property;
- 4. Permitting Movant to offer and provide Debtor with information re: a potential Forbearance Agreement, Loan Modification, Refinance Agreement, or other Loan Workout/Loss Mitigation Agreement, and to enter into such agreement with Debtor;
- 5. Alternatively, in the event this court declines to grant Movant the relief requested above, Movant requests that an Order for adequate protection be issued, requiring the Debtor to reinstate and maintain in a current condition all obligations due under the Note and Deed of

1	Trust and all other deeds of trust encumbering the Real Property, including Debtor's obligation		
2	to pay when due (a) the monthly installments of principal and interest, as required under the		
3	Note; (b) tax/insurance obligations; and (c) any sums advanced by Movant on behalf of Debto		
4	in order to protect Movant's interest in the Real Property, including all attorneys' fees and cos		
5	incurred in the filing of this motion;		
6	6. That the attorneys' fees and costs incurred by Movant for filing the instant Motion		
7	be included in the outstanding balance of the Note as allowed under applicable non-bankrupto		
8	law; and		
9	7. For such other and fur	ther relief as the court deems just and proper.	
10	Dated: February 26, 2010	PITE DUNCAN, LLP	
11			
12		/s/ CASPER J. RANKIN (CA SBN 249196) Attorneys for BANK OF AMERICA, NATIONAL	
13		ASSOCIATION AS SUCCESSOR BY MERGER TO LASALLE BANK NATIONAL	
14		ASSOCIATION, AS TRUSTEE FOR CERTIFICATEHOLDERS OF BEAR STEARNS	
15		ASSET BACKED SECURITIES TRUST 2005-3, ASSET-BACKED CERTIFICATES, SERIES	
16		2005-3	
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